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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 JOHN THOMAS ENTLER,
8 Plaintiff,

9 vs.

10 CHRISTINE GREGOIRE, et al.,
11
12 Defendants.
13

No. CV-12-5141-JPH

**ORDER DENYING
MOTION FOR
RECONSIDERATION**

14 **BEFORE THE COURT** is the Plaintiff's Motion For Reconsideration
15 (ECF No. 65). The motion is heard without oral argument at the court's
16 discretion pursuant to LR 7.1(h)(3)(B)(iii).

17 Plaintiff asks the court to reconsider its October 15, 2013 "Order
18 Adopting Report And Recommendation" of Magistrate Judge Hutton (ECF No.
19 61). While that order considered the objections to the report and
20 recommendation filed by Plaintiff (ECF No. 59), it did not consider the
21 objections filed by Defendants (ECF No. 60). Recognizing such, the Plaintiff
22 has, along with his Motion For Reconsideration, filed a response to the
23 Defendant's objections to the Report and Recommendation (ECF No. 66). The
24 undersigned has considered the Defendant's objections in ruling on the
25 Plaintiff's Motion For Reconsideration. The undersigned has also considered
26 Plaintiff's reply filed in conjunction with his Motion For Reconsideration.

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1 That reply (ECF No. 76) was filed on December 16, 2013.

2 Magistrate Judge Hutton found that Plaintiff's sending of kites amounted
3 to an "act of filing informal 'grievance' materials" which constitutes "protected
4 conduct for the purposes of [Plaintiff's] retaliation claim." (ECF No. 57 at pp.
5 5-7). It is apparent to the undersigned, however, that Plaintiff's kites were not
6 part of the grievance process. A kite is not an informal grievance which is
7 "filed." A kite may be part of an "informal resolution" which precedes the
8 grievance process, but the grievance process only commences at "Level 1"
9 when a formal grievance- "a typed, formalized version of a complaint"- is filed
10 with the grievance coordinator. (ECF No. 5-2 at pp. 40-41)(Emphasis in
11 original). Plaintiff was not required to send kites and letters to prison staff in
12 lieu of filing a formal grievance with the grievance coordinator.

13 *Brodheim v. Cry*, 584 F.3d 1262 (9th Cir. 2009) is not to the contrary. In
14 *Brodheim*, the plaintiff's "interview request- a challenge to an adverse ruling
15 on his complaint- was part of the grievance process, and was thus protected
16 activity." *Id.* at 1271, n. 4. This interview request came one month after the
17 plaintiff had initiated the grievance process by filing an administrative
18 grievance. *Id.* at 1265. Here, Plaintiff's kites preceded the grievance process
19 and therefore, were not protected activity pursuant to which a First Amendment
20 retaliation claim can be brought. Instead of presenting his complaints to a
21 grievance coordinator, Plaintiff communicated his complaints and his
22 accompanying threats of legal action directly to the staff members who he
23 believed had wronged him. In this particular context, there is clearly a valid,
24 rational connection between a prison regulation which forbids using physical
25 force, intimidation or coercion against prison staff and a correctional
26 institution's legitimate penological interest in the "peaceable operation of the

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1 prison through the insistence on respect.” *Bradley v. Hall*, 64 F.3d 1276, 1281-
2 82 (9th Cir. 1995).

3 Even assuming Plaintiff’s kites constituted protected activity, his
4 retaliation claim still fails. Magistrate Judge Hutton correctly found the
5 defendants are entitled to qualified immunity. While the Plaintiff has a clearly
6 established constitutional right to file prison grievances, he does not have a
7 clearly established right to level threats against prison staff members. It is true
8 the Ninth Circuit has “previously held that disrespectful language in a
9 prisoner’s grievance is itself protected activity under the First Amendment.”
10 *Brodheim*, 584 F.3d at 1271, citing *Bradley*, 64 F.3d at 1281-82 (holding that
11 “prison officials may not punish an inmate merely for using ‘hostile, sexual,
12 abusive or threatening’ language in a written grievance”). *Bradley*, however,
13 was criticized by the U.S. Supreme Court in *Shaw v. Murphy*, 532 U.S. 223,
14 121 S.Ct. 1475 (2001). The Supreme Court disapproved of that portion of the
15 Ninth Circuit’s analysis in *Bradley* where it “balance[d] the importance of the
16 prisoner’s infringed right against the importance of the penological interest
17 served by the rule” and found that as applied to the content of formal written
18 grievances, the rule impermissibly “substantially burdened” prisoners’ right of
19 access to the courts. *Shaw*, 532 at 230-31, quoting *Bradley*, 64 F.3d at 1280.
20 The Supreme Court concluded that *Turner v. Safley*, 482 U.S. 78, 107 S.Ct.
21 2254 (1987), does not permit increasing constitutional protection based on the
22 **content** of the communication because *Turner* does not accommodate
23 valuations of content. *Id.* at 231, citing *Turner*. (Emphasis added). On the
24 contrary, the *Turner* factors concern only the relationship between the asserted
25 penological interests and the prison regulation.” *Id.* at 230.

26 In *Helm v. Hughes*, 2011 WL 476461 (W.D. Wash. 2011), the plaintiff,

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1 an inmate at the McNeil Island Corrections Center, brought a lawsuit claiming
2 he had been subjected to disciplinary punishment in retaliation for his good
3 faith participation in the grievance program. The plaintiff was infracted for
4 violation of Washington Administrative Code (WAC) 137-25-030(506)-
5 threatening another with bodily harm or with any offense against another
6 person, property, or family- and sanctioned for a threat contained in the
7 grievance filed by him. The plaintiff maintained he was wrongly disciplined
8 because the language contained in the grievance was not a direct threat. In her
9 report and recommendation, the Magistrate Judge noted:

10 *Shaw* instructs . . . that the court's focus must be content
11 neutral. Prison officials are to remain the primary
12 arbiters of the problems that arise in prison management.
13 If courts were permitted to enhance constitutional
14 protection based on their assessments of the content of
15 the particular communications, courts would be in a
16 position to assume a greater role in decisions affecting
17 prison administration. [Citation omitted]. Thus, this
18 court will not second guess prison officials' determination
19 that the language contained within Mr. Helm's grievance
20 contained a threat. The issues here are whether the
21 prison regulation at issue is "reasonably related" to
22 legitimate penological objectives and whether there is
23 a genuine dispute that prison officials acted unreasonably
24 in applying the prison regulation to Mr. Helm's written
25 grievance. [Citations omitted].

26 2011 WL 476461 at *4.

27 Applying the *Turner* factors, the Magistrate Judge concluded there was a
28 valid, rational connection between WAC 137-35-030(506) and legitimate
government interests: "Whether written or spoken, there is clearly a rational
connection between the regulation of prohibiting inmates from threatening and
coercing persons and the legitimate interest of maintaining order in
institutions." *Id.* at *7. The same is true in the instant case with regard to the
infractions of which Plaintiff was found guilty: WAC 137-25-030(663)- using

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1 physical force, intimidation or coercion against any person, and WAC 137-28-
 2 220(202)- abusive language, harassment or other offensive behavior directed to
 3 or in the presence of staff.

4 In *Helm*, the Magistrate Judge noted there was no evidence the plaintiff
 5 was prohibited from filing grievances and indeed, acknowledged the plaintiff
 6 was disciplined because of the content of his grievance. The regulation
 7 constrained only the nature of the language the plaintiff chose to include in his
 8 grievances and he was free to file a grievance that did not include a threat. *Id.*
 9 The same is true in the instant case. Plaintiff was not prohibited from filing
 10 grievances against the prison staff members he claims wronged him. He was
 11 disciplined because of the content of his kites. WAC 137-25-030(663) and
 12 WAC 137-28-220(202) constrained him only as to the nature of the language
 13 he chose to use.

14 The Magistrate Judge in *Helm* went on to consider whether application
 15 of the regulation to plaintiff's grievance was reasonable. She concluded it was
 16 reasonable:

17 Mr. Helm argues he did not intend his words to be
 18 viewed as a threat. However, it is not up to this court
 19 (or a jury) to guess what Mr. Helm might have been
 20 thinking when he wrote his grievance. Even if the court
 21 accepted that Mr. Helm did not intend a threat, it is not
 22 this court's role to suggest to prison officials that an
 23 alternative interpretation may exist.

24 . . .

25 Unlike the inmate in *Hargis* [*v. Foster*, 312 F.3d 404
 26 (9th Cir. 2002)], there is no issue of material fact here
 27 as to what Mr. Helm said. He wrote what he wrote.
 28 Whether he intended to threaten Correctional Officer
 Bengé is not material to this analysis. What is material
 is that there exists a regulation to prohibit threatening
 language, the regulation is constitutional because it
 has legitimate penological purposes, and prison officials
 reasonably determined that the regulation should be

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1 applied to the words contained in Mr. Helm's grievance.
2 Grievance Specialist Hughes believed that the language
3 constituted a threat. He sent the grievance on to
4 Superintendent [sic] Van Boening, who agreed that the
5 words constituted a threat. Mr. Hughes then instituted
6 the infraction process and the infraction was upheld in
7 a disciplinary hearing by Hearings Officer Janet Gaines
8 and Superintendent Designee Sean Murphy. The court
9 concludes they did not act unreasonably in applying the
10 regulation to Mr. Helm's written grievance.

11 *Id.* at *8.

12 Similarly here, the application of WAC 137-25-030(663) and WAC 137-
13 28-220(202) to Plaintiff's kites was reasonable. These regulations are
14 constitutional because they serve legitimate penological purposes, and prison
15 officials reasonably determined the regulations applied to the words used in
16 Plaintiff's kites.

17 In *Helm*, the Magistrate Judge concluded the defendants had not violated
18 the plaintiff's constitutional rights, recommended that summary judgment be
19 granted on his retaliation claims, and found it was unnecessary to address
20 whether qualified immunity should be applied. *Id.* at *9-10. Her
21 recommendation was subsequently adopted by the district judge. 2011 WL
22 462567 (W.D. Wash. 2011). Magistrate Judge Hutton too would have been
23 justified in finding no violation of Plaintiff's constitutional rights, but he
24 correctly concluded there is "no clearly established right entitling a prison
25 inmate to communicate threats in writing to prison staff in the form or guise of
26 grievances or otherwise" and therefore, that Defendants are entitled to qualified
27 immunity. (ECF No. 57 at pp. 12-13).

28 The Ninth Circuit's decision in *Brodheim* did not erase the Supreme
Court's criticism in *Shaw* of the Ninth Circuit's decision in *Bradley*. This
criticism was noted not only by the Magistrate Judge in *Helm*, but also by

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1 Ninth Circuit Judge Tallman in the dissenting opinion he filed in *Hargis v.*
2 *Foster*, 312 F.3d at 413-416. Judge Tallman disagreed with the majority
3 opinion which he described as effectively “mandat[ing] that a jury be allowed
4 to determine how coercive and dangerous Hargis’s speech was.” *Id.* at 413.
5 The *Hargis* case involved a factual situation bearing significant resemblance to
6 the case before this court, described in Judge Tallman’s dissenting opinion as
7 follows:

8 Prisons exist in order to maintain order over those who
9 have demonstrated that they are incapable of following
10 the rules established by society. Coercion undermines
11 that effort. Prisoners have alternative means of exercising
12 their rights, such as by filing a written grievance rather
13 than directing comments personally to guards. Allowing
14 inmates such as Hargis to personally threaten or warn
15 guards like Beauchamp to evade compliance with legitimate
16 institutional rules would have a dramatic effect on prison
17 life- prisoners would be quicker to verbalize and attempt
18 to intimidate guards, and guards would have to attempt to
19 guess what a prisoner *really meant* every time a prisoner
20 made a veiled threat. Finally, the government has few
21 alternatives in this sort of situation. Prison officials must
22 maintain order if they are to remain in control. The
23 written grievance procedure available here accommodates
24 prisoner’s rights while preventing direct confrontations
25 between guards and prisoners.

26 It is not our job, or that of a jury, to guess what Hargis
27 might have meant or might have been thinking when he
28 verbally warned Beauchamp that if he forced Hargis to
shave with a safety blade Beauchamp’s action would be
subject to court review. Prison officials conducted a
disciplinary hearing and determined that those words
represented coercion. It is not the legitimate role of a
federal court to suggest to the warden and his officers
that there is an alternative interpretation, that prison
officials may have been wrong, and that a jury should
determine the truth.

...

We simply do not analyze a prisoner’s First Amendment
rights the way we would the First Amendment rights of
a law-abiding citizen. Prisoners sacrifice many of their
freedoms as proper punishment for their crimes. Whether

1 inmate Hargis actually intended to threaten or coerce
2 correctional officer Beauchamp does not matter. What
3 does matter is that the Idaho Correctional Institution in
4 Orofino had a necessary regulation designed to prohibit
5 coercion; the regulation is clearly constitutional because
6 it has a legitimate penological purpose; and prison officials
7 reasonably determined that Hargis sought to coerce
8 Officer Beauchamp. This determination was certainly within
9 the “broad discretion” granted prison officials.

10 *Id.* at 415-16. (Emphasis in original).

11 Plaintiff Entler was entitled to file a formal grievance with the grievance
12 coordinator seeking to redress the alleged wrongs committed against. He did
13 not file such a grievance. Instead, he sent kites directly to the prison staff he
14 asserted had wronged him, threatening them with lawsuits, criminal charges,
15 and arrest. Even assuming these kites constituted grievances, Plaintiff was not
16 retaliated against for petitioning for a redress of his grievances; instead, he was
17 punished for making threats in those kites. Unlike the act of petitioning for
18 redress of grievances, those threats are not protected activity. The Plaintiff has
19 a right to petition for redress of grievances, simply stating in a non-threatening
20 fashion what the alleged problem is and how it can be corrected. Nothing
21 precluded Plaintiff from filing a formal grievance with the grievance
22 coordinator seeking a remedy for the wrongs alleged by him. He may not,
23 however, abuse the process. If he does so, he is subject to punishment without
24 infringing on his right to petition for redress of grievances. Defendants
25 correctly point out that “[a]lternative ways to communicate to staff remain open
26 because inmates can use the grievance process or can write letters and kites that
27 do not attempt to intimidate staff.”

28 Here too, in this litigation, Plaintiff seeks to operate outside of the
established process by sending letters to the Chief Judge of this district, the
Chief Judge of the Ninth Circuit Court of Appeals, the Chief Justice of the

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1 United States Supreme Court, the U.S. Department of Justice, and the
2 American Civil Liberties Union (ECF Nos. 63, 64, 67 and 68), threatening to
3 file criminal charges against court personnel, instead of simply presenting his
4 legal arguments to this court in his Motion For Reconsideration, and hereafter
5 to the Ninth Circuit Court of Appeals and potentially to the United States
6 Supreme Court. Plaintiff has a right to send these letters, they have been filed
7 of record, and they have no bearing on this court's analysis of the proper legal
8 argument presented in Plaintiff's Motion For Reconsideration. In the prison
9 context, however, threatening letters are subject to infraction by prison
10 authorities in the interests of institutional order and security.

11 A Fed. R. Civ. P. 59(e) motion to alter or amend can only be granted
12 when a district court: (1) is presented with newly discovered evidence; or (2)
13 committed clear error or the initial decision was manifestly unjust; or (3) there
14 has been an intervening change in controlling law. *Dixon v. Wallowa County*,
15 336 F.3d 1013, 1022 (9th Cir. 2003). This court did not commit clear error in
16 adopting the Magistrate Judge's report and recommendation and that decision
17 is not manifestly unjust. Accordingly, Plaintiff's Motion For Reconsideration
18 (ECF No. 65) is **DENIED**. The court will entertain no additional motions for
19 reconsideration and Plaintiff's next recourse is an appeal to the Ninth Circuit.
20 Because the Plaintiff is not proceeding *in forma pauperis*, this court need not
21 certify whether an appeal is taken in good faith.

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IT IS SO ORDERED. The District Executive shall forward a copy of this order to Plaintiff, to counsel for Defendant, to Magistrate Judge Hutton, and to Chief Judge Peterson.

DATED this 19th of December, 2013.

s/Lonny R. Suko

LONNY R. SUKO
Senior United States District Judge